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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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OCT - 6 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Telecommunications Services Inside Wiring
Customer Premises Equipment

CS Docket No. 95-184

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992:

MM Docket No. 92-260

Cable Home Wiring

REPLY COMMENTS

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October 6, 1997

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INTRODUCTION AND SUMMARY

The Joint Commenters reiterate their fundamental belief that the Commission lacks the statutory authority to enact any rules governing the disposition of home run wiring in MDUs. If the Commission nevertheless makes good on its intention to enact a form of the proposed rules expeditiously, then it should also make good on its stated intention to leave intact all existing rights under state statutes, contracts, easements, and licenses.

The premise of the proposed home run wiring rules is that the wiring is owned by the incumbent provider and is lawfully serving customers. Several comments submitted in response to the Commission's FNPRM endorse a federal presumption that incumbent video service providers have no enforceable legal right to remain on the premises of an MDU. Others propose a more expeditious eviction of the incumbent. Any such presumption or rule, however, would disregard the strong preference of courts for maintaining the status quo pending resolution of disputed claims of right. It would effectively establish a mandatory injunction under federal law that would dispossess the incumbent of its property and its customers, contrary to a substantial expectation incumbents have under existing court standards. The FCC should reject any such rule or presumption, and should instead incorporate a stay of its rules if the incumbent files a suit to establish the enforceability of its right to remain on the premises.

The Joint Commenters submit that the comments of six MDU owner interest groups show that these businesses are sophisticated, understand the video services market, and do not want the FCC to regulate home run wiring. They agree that the Commission lacks authority for the proposed rules.

Commenters for alternative MVPDs support either a new MDU demarcation point or a definition of "physically inaccessible" wiring that would accomplish the same result. The demarcation point under the existing rules, however, is the required by Section 624(i). The only wire that is truly inaccessible is that within concrete, brick, metal duct, or which would require disruption of the building's load-bearing support structures.

The comments submitted, and the record of this proceeding, do not support the imposition of any forfeiture on the incumbent operators if it fails to remove wiring after electing to do so. If the Commission believes that its proposed rules provide some incentive for the incumbent to elect to remove wiring and then ultimately leave it in the MDU, the solution is to assure that the incumbent is not paid less than the reasonable market value of its wiring.

Those commenters who suggest that the FCC require the disposition of MDU home run wiring upon install provide no statutory authority for such a rule. None exists.

Finally, the Joint Commenters disagree with those comments that believe Section 207 of the Telecommunications Act of 1996 controls this proceeding. That provision, and the FCC's proceedings thereunder, only address the placement of various video receiving antennae. Section 207 has no relevance to the disposition of property owned by incumbent cable operators.

I. A PRESUMPTION AGAINST THE INCUMBENT'S RIGHT TO USE AND MAINTAIN ITS WIRING WOULD ABROGATE EXISTING RIGHTS

The starting point of the proposed MDU rules is that the incumbent provider owns the home run wiring and is lawfully serving customers. Incumbents, as owners, should therefore have the right to resolve any doubts over disposition of the wiring in court. Although the Commission intends to abstain from interfering with state rights in contract, access-to-premises laws, easements, and licenses, a presumption against the incumbent's right to use and maintain its home wiring in MDUs would seriously compromise those rights. Courts presume *that the status quo should be preserved pending final determination of the merits of the claims*.¹ And yet, a presumption that the incumbent has no right to remain favors disrupting the status quo, contrary to traditional jurisprudence. The Commission, therefore, should reject comments submitted in response to the FNPRM (§ 34) supporting such a presumption.²

Similarly, RCN's proposal to evict an incumbent operator that is unable to obtain a temporary restraining order within 30 days would disrupt the status quo.³ Such a rule would amount to a nationwide mandatory injunction which would automatically evict an incumbent, at

¹ "It has often been observed that the purpose of the preliminary injunction is the preservation of the status quo and that an injunction may not issue if it would disturb the status quo." Wright, Miller, Kane, *Federal Practice and Procedure*, § 2948 at 133-135 n. 11 and 12.

² Comments of Independent Cable & Telecommunications Association ("ICTA") at 3; Comments of EchoStar Communications Corp. at 2. Cites herein to various "Comments," unless otherwise noted, refer to the comments filed on September 25, 1997 in response to the Commission's *Further Notice of Proposed Rulemaking* in CS Docket No. 95-184 and MM Docket No. 92-260 (rel. August 28, 1997).

³ Comments of RCN Telecom Services, Inc. ("RCN") at 12. *See also* Comments of Heartland Wireless Communications, Inc. at 5 (time periods should not be tolled pending the resolution of such claims); Comments of The Wireless Cable Association International, Inc. at 8 (proposed notice periods should run even where incumbent claims legal right to remain).

the behest of the FCC, when rights are in doubt but recourse to a TRO process is either unavailable or the local court puts the matter over to a preliminary injunction hearing.

Both proposals substantially compromise ordinary remedies law. Courts frame their refusal to alter the positions of the parties in varying ways, but they will not order one party to sever business relationships, and transfer ownership to property unquestionably theirs, absent some extraordinary and imminent "irreparable injury" that would occur without the order, and even then, they will only act in the most compelling situations.⁴ The Commission's proposal for a presumption that the incumbent has no right to remain on the premises turns this on its head,

⁴ See, e.g., *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3rd Cir. 1940) (A preliminary injunction that would alter the prior status of the parties "may be directed only after final hearing, the office of a preliminary injunction being, as we have pointed out, merely to preserve pendente lite the last actual noncontested status which preceded the pending controversy."); *Gamlen Chem. Co. v. Gamlen*, 79 F. Supp. 622 (D.C. Pa. 1948) (A preliminary injunction may not be used to subvert the existing status, or to take property out of the possession of one party and put it into the possession of the other.); *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (When party seeks mandatory injunction that goes well beyond maintaining status quo pendente lite, courts should be extremely cautious about issuing injunction and relief should be denied unless facts and law clearly favor the moving party.) *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (Mandatory preliminary injunctive relief in any circumstance is disfavored and warranted only in most extraordinary circumstances) (supporting citations to 10th and 5th Circuits omitted); *Shodeen v. Chicago Title and Trust Co.*, 515 N.E.2d 1339 (Ill. App. 2 Dist. 1987) (Subdivision developer was not entitled to mandatory preliminary injunction requiring land trust company to convey deeds of certain lots within subdivision to developer, despite developer's potential liability for breach of contract to purchasers of lots --courts do not favor mandatory preliminary injunctions.); *Shoemaker v. County of Los Angeles*, 37 Cal.App. 4th 618, 43 Cal.Rptr.2d 774 (1995) (Granting of preliminary injunction pending trial is not permitted except in extreme cases when the right thereto is clearly established); *City of Stamford v. Kovac*, 612 A.2d 1229 (Conn. App. 1992) (purpose of temporary injunction is to preserve status quo until rights of parties can be finally determined after full hearing on the merits); *Chiasson v. New York City Dept. of Consumer Affairs*, 132 Misc.2d 640, 505 N.Y.S.2d 499 (1986) (heavy burden on the moving party to demonstrate entitlement and irreparable injury before mandatory injunction will issue).

granting in effect a nationwide mandatory injunction unless overturned by a local court. The FCC should not substantively alter local laws and rights with any such presumption.

Moreover, RCN's proposed schedule is unrealistic. A cable operator may fairly be expected to *initiate* an action within 30 days. But TROs are extraordinary remedies. Judges are not always available to entertain TRO motions, let alone rule on them. The proposal to make a TRO the sole basis to halt the operation of the proposed rules means that an operator can irrevocably suffer injury if no TRO forum is available. Even if TRO papers are filed within thirty days, it is not uncommon for a judge to put the matter over to preliminary injunction to receive additional briefing, to permit some discovery, or otherwise to accommodate the needs of the court.

The Joint Commenters therefore reiterate their support for a stay of the Commission's home run wiring rules pending judicial resolution of the incumbent provider's right to remain on the premises.⁵ Indeed, ICTA, representing the interests of numerous alternative service providers that would benefit from the proposed rules, appears to agree that the rules should operate "[i]n the absence of any actual enforcement action surrounding the access claim" of the incumbent.⁶ If the incumbent initiates such a claim within the notice period, ICTA seems to agree that the rules are not operative until the court resolves the merits of the claim.

⁵ See Comments of National Cable Television Association, Inc. at 14 - 22.

⁶ Comments of ICTA at 3. Joint Commenters, however, disagree strongly with ICTA's support of a presumption that the incumbent does not have an enforceable legal right to remain on the premises. An FCC rule that states it is the incumbent's obligation to pursue legal action — a procedural rule proposed by ICTA — is quite different than a presumption on the parties' substantive rights.

Short of a presumption, a number of commenters asked the Commission to reduce the time periods for the incumbent to elect whether to sell, remove, or abandon wiring.⁷ Thirty days cannot be considered "too long" for the owner of wiring to assess the enforceability of its rights, to institute judicial proceedings to determine those rights, or to elect to sell, remove, or abandon the wire. In fact, one of the MDU owner commenters asks the Commission to provide a much *longer* period in which to resolve the transfer of wiring.⁸ Landlords generally must give tenants at least 30 days' notice prior to termination of the tenancy.⁹ The Commission normally allows thirty days for parties to respond to a forfeiture citation or a notice of apparent liability for forfeiture.¹⁰ The bankruptcy rules ordinarily allow at least thirty days, if not ninety days or more, for an unsecured creditor or an equity security holder to file proof of a claim or interest in a chapter 7 or chapter 13 bankruptcy proceeding.¹¹ Surely, thirty days is not too long to allow a cable operator serving an MDU with its own wiring to assess its rights and take the steps necessary under the proposed rules either to protect those rights or to transfer the home run wiring.

⁷ Comments of RCN at 13; Comments of Leaco Rural Telephone Cooperative at 4; Comments of ICTA at 7; Comments of SBC Communications Inc. at 3.

⁸ Comments of the Community Associations Institute at 11-12.

⁹ *See, e.g.*, Calif. Civ. Code § 1946; Conn. Gen. Stat. § 21-80(b)(3)(B); D.C. Code § 45-1402; Kans. Code § 58-2505; Mo. Rev. Stat. § 441.060; Mont. Code § 70-27-104; Or. Rev. Stat. § 90.900(2).

¹⁰ 47 C.F.R. § 1.80 (da, (f)(3) (respondent given reasonable period of time (usually 30 days) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture).

¹¹ Bankruptcy Rule 3002(c), 11 U.S.C.A.

II. THE COMMISSION SHOULD LEAVE REPAIR OF MDUs UPON REMOVAL OF WIRING TO PRIVATE CONTRACTS AND STATE LAWS.

Commenters representing MDU interests and alternative MVPDs recommend that the Commission establish a requirement for incumbent providers to post a bond for the removal of wiring and repair of MDU property.¹² Private contracts and state laws already provide landlords with adequate modes of protection against property damage by MVPDs. State laws typically *do not* require cable operators to post bonds to protect MDU owners against property damage.¹³ No commenter presents any evidence supporting a need for such bonds. Thus, federal rules are unnecessary.

III. EXPECTED BENEFICIARIES OF FCC REGULATION HAVE OPPOSED THE RULES

The Commission's rules are premised on the view that building-by-building competition will be enhanced by giving MDU owners a federal path to ownership of the home run wiring. Six different MDU owner interest groups, however, believe that they can protect their interests and those of MDU tenants without the assistance of any national regulation.¹⁴ BOMA is "more convinced than ever that the market will resolve the issue more efficiently and

¹² See, e.g., Comments of Community Associations Institute at 14; Further Joint Comments of Building Owners and Managers Assoc. International *et al.* ("BOMA") at 4-5; Comments of RCN at 14-15; Comments of ICTA at 6.

¹³ See, e.g., Conn. Gen. Stat. § 16-333a (b); D.C. Code § 43-1844.1 (a)(1)(C); 55 ILCS 5/5-1096 (d); 14 Maine Rev. Stat. § 6041.1.A.; N.J. Stat. § 48:5A-49; N.M. Stat. § 63-10-3.C.; N.Y. CLS Pub Ser § 228.1.(3); 68 Penn. Stat. § 250.505-B; R.I. Gen. Laws § 39-19-10; Utah Code § 54-4-13 (2)(e); Va. Code § 55-248.13:2; W.Va. Code § 5-18-12(d); Wisc. Stat. § 66.085(4).

¹⁴ Further Joint Comments of BOMA at 2.

effectively than regulation,"¹⁵ and share our view that the Commission lacks jurisdiction to adopt such rules.¹⁶ These commenters clearly exhibit the market sophistication which we described in our initial comments, and do not welcome the rules being proposed for their benefit.

IV. THE DEMARCATION POINT IN MDUs SHOULD BE THE SAME AS IN INDIVIDUAL RESIDENCES AND "PHYSICALLY INACCESSIBLE" WIRING SHOULD BE NARROWLY DEFINED.

A number of comments filed by franchised cable's competitors call for relocation of the demarcation point in MDUs.¹⁷ Some comments, seeking to achieve the same result, ask the Commission to broadly define "physically inaccessible" wiring.¹⁸ Wiring located in molding or drywall is easily accessible. Moreover, repair of drywall requires only rudimentary skill, and thus, may not be considered an obstacle to the use of wiring. Exhibit 1 (how-to primer on drywall repair). Joint Commenters agree with the Comments of CableVision Communications, Inc., *et al* that any definition of "physically inaccessible" wiring be limited to wiring located

¹⁵ Further Joint Comments of BOMA at 4.

¹⁶ Further Joint Comments of BOMA at 10. According to BOMA, "[i]f the Commission were correct, it would have the authority to do anything that Congress has not explicitly forbidden," a result unprecedented in administrative law. *Id.* The New York PSC likewise noted "serious questions about the Commission's authority to promulgate rules concerning wiring other than wiring within the tenant's premises." Comments of the New York State Department of Public Services at 3 n.1.

¹⁷ See, e.g., Comments of RCN at 2; Comments of Heartland Wireless Communications, Inc. at 6; Comments of OpTel, Inc. at 7-8; Comments of The Wireless Cable Association International, Inc. at 14; Comments of DirecTV, Inc. at 9.

¹⁸ See, e.g., Comments of GTE at 16; Comments of RCN at 3.

behind brick or cinder block, within metal conduit, or in a location access to which would require the disturbance of load-bearing support structures.¹⁹

V. A RULE THAT ASSURES INCUMBENTS WILL BE PAID THE MARKET VALUE FOR WIRING IS A BETTER ASSURANCE OF COMPLIANCE THAN ARBITRARY FORFEITURES

In the FNPRM, the Commission sought comment on whether to adopt penalties for incumbent providers that elect to remove their home run wiring and then fail to do so.²⁰ The Commission did not base its proposal on any evidence of cable operator misrepresentations in the MDU context.²¹ Instead, the Commission reasoned that under its proposed rules, "an incumbent provider may initially elect to remove its home run wiring and then decide to abandon it" as a stratagem.²² If the Commission believes there are such incentives, it can eliminate them by assuring that the incumbent is paid the market value of its inside wiring.

Some commenters believe that a negotiated price will provide the proper price for wiring.²³ Other commenters believe that default prices could eliminate any incentives to abandon wiring, reduce transaction costs, and provide parties with some certainty.²⁴ And NCTA proposes

¹⁹ See Comments of CableVision Communications, Inc. et al at 27.

²⁰ FNPRM at ¶ 36.

²¹ *Id.*

²² FNPRM at ¶ 36.

²³ See, e.g., Comments of GTE at 10-11; Comments of RCN at 13; Comments of Adelphia Cable Communication, *et al.* at 28; Comments of Cox Communications, Inc. at 12-15.

²⁴ See, e.g., Comments of Tele-Communications, Inc. at 17-19 and Ex. C; Comments of Cablevision Systems Corp. at 11-17.

that the rules not apply if the incumbent makes a reasonable offer to sell its wire (however defined) and the MDU owner rejected the offer.²⁵ So long as the rules allow the incumbent to be paid the full market value of its wiring (*i.e.*, replacement value), then no penalty schedule is needed. Cable operators would be reimbursed for their investment and their property; alternative providers would be able to serve customers presumably sooner than if the incumbent elects to pull its wire and new wiring is needed; MDU tenants would be able to receive the alternative service more rapidly; and MDU properties would not be unnecessarily subjected to installation and removal of wiring.

VI. THE COMMISSION MAY NOT COMPEL THE DISPOSITION OF MDU WIRING UPON INSTALLATION

Several commenters request the Commission to require or regulate the transfer of ownership of MDU wiring upon installation.²⁶ The FCC's jurisdiction, however, is limited to the disposition of wiring within subscriber premises upon voluntary termination — not upon installation. The commenters filing for MDU owner interests and some alternative MVPDs, all of whom would seem to benefit from this proposal, agree.²⁷

VII. THE COMMISSION'S PROCEEDING UNDER SECTION 207 OF THE 1996 ACT DOES NOT CONTROL CABLE INSIDE WIRING OR MDU HOME RUN WIRING

Several commenters suggest that any FCC rules governing MDU home run wiring and cable inside wiring must be adopted in conjunction with the Commission's ongoing

²⁵Comments of NCTA at 22-25.

²⁶Comments of Community Associations Institute at 16; Comments of RCN at 15; Comments of DirecTV at 16; Comments of CFA at 21.

²⁷ See, *e.g.*, Further Joint Comments of BOMA at 9-10; Comments of the Community Association Institute at 16; Comments of OpTel, Inc. at 7; Comments of Heartland Wireless Communications, Inc. at 7.

proceeding under Section 207 of the Telecommunications Act of 1996.²⁸ That provision required the Commission to promulgate rules "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals," MMDS service, or DBS services.²⁹ This provision speaks only to antennas for reception of wireless video services; it does not authorize or require rules that affect MDU home run wiring or inside wiring that is currently owned by the existing video service provider.

The legislative history makes clear that any regulations enacted under this provision only apply to preempt government and MDU restrictions on placement of antennae and similar devices.³⁰ The FCC has shown that it agrees in its existing DBS antenna rule,³¹ and its proposed rules to preempt regulations enforced by states, local governments, homeowners' associations and similar nongovernmental restrictions on placement of DBS, MMDS and broadcast television antennae.³²

²⁸ Comments of CFA at 4-6; Comments of Philips at 10-11; Comments of NAB.

²⁹ *Telecommunications Act of 1996*, Pl 104-104, 110 Stat. 56 (1996) § 207.

³⁰ The House Report explains that Section 207 is designed "to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' associations rules, shall be unenforceable." H.R. Rep No. 204, 104th Cong., 1st Sess. 123-24 (1995).

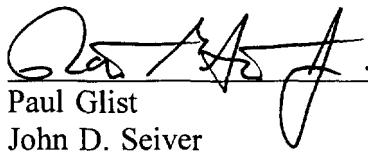
³¹ 47 C.F.R. § 25.104 (rule enacted applies to governmental restrictions).

³² *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, 11 FCC Rcd. 5809 at ¶ 62 (1996) (proposed DBS rule covering "nongovernmental restrictions on small antenna video reception"); *Implementation of Section 207 of the Telecommunications Act of 1996*, CD Docket No. 96-83; 11 FCC Rcd. 6357, 6360 at App. A (1996) (proposed rule covering TVBS and MMDS antennae).

VIII. CONCLUSION

For the foregoing reasons, the FCC should not adopt any rules governing the disposition of home run wiring. In the alternative, if the Commission enacts its proposed rules, it should incorporate modifications proposed in these Reply Comments.

Respectfully Submitted,



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October 6, 1997

Exhibit 1

Installing, Finishing and Repairing Drywall

Repairing Drywall

Dents

Small Holes and Cracks

Popped Nails

Medium Holes

Large Cracks (1/8" or larger)

Large Holes (2" or larger)

Torn Gypsum Face Paper

Repairing damaged drywall is easy with the right products. U.S. Gypsum recommends using its EASY SAND 90 Joint Compound or the SHEETROCK Drywall Repair Kit. Follow these simple steps to repair virtually any wallboard damage:

Dents



Simply sand over the dent and fill with joint compound. Add a second coat if necessary. Sand and prime when dry.

Small Holes and Cracks



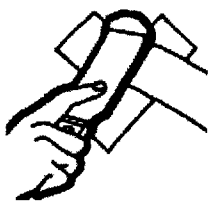
Wipe the area clean and fill with joint compound. Add a second coat if necessary. Sand and prime when dry.

Popped Nails



Drive and dimple a new nail 1-1/2" from the popped nail. Drive and dimple the popped nail. Cover with joint compound, then sand and prime when dry.

Medium Holes



Apply generous amounts of joint compound around the edges and coat the perimeter of the hole. Crisscross two or three strips of joint tape over the opening and embed the tape in joint compound. Let harden. Apply a coat of joint compound over the taped area. Let harden and apply a second coat. Sand and prime when dry.

Large Cracks (1/8" or larger)



Apply compound to crack with a 5" finishing knife.

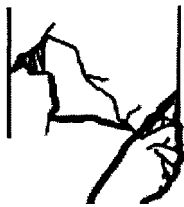


Embed tape in compound to bridge crack. Draw knife firmly over crack to tightly embed tape. Let compound harden

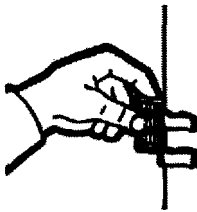


Apply compound over tape with knife. Let harden and apply second coat of compound if necessary. Sand and prime when dry.

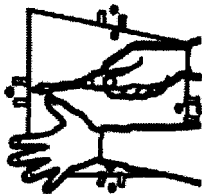
Large Holes (over 2") or Water-Damaged Areas



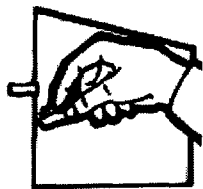
Cut out the damaged panel section with a utility knife along the studs, or a keyhole saw between the studs. Remove the section with a hammer and remove old nails and screws.



Slip SHEETROCK Drywall Repair Clips over all four edges of the cut-out section. Each clip features a tab, which overhangs the existing drywall. Screw each tab into the existing drywall, positioning the screws about 3/4" from the edge of the cut-out area.

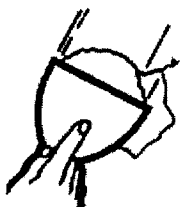


Measure and cut a new drywall panel to fit the damaged area and position in place. Screw through the new drywall into each of the four repair clips. Align the screws to the screws already in place holding the clips onto the existing drywall. Screw the new drywall in place approximately 3/4" from the edges.



Then, remove the tabs from each clip. Apply joint compound and tape over all four edges. Do not overlap the tape. Apply second and third coats of joint compound over the edges, allowing each coat to harden before applying the next coat. Feather out each coat. Sand and prime when dry.

Torn Gypsum Panel Face Paper



Peel and remove all loose face paper. Apply a skim coat of joint compound with a joint finishing knife over the damaged area and feather to get a smooth finish. Let dry and apply a second coat, if necessary. Sand and prime when dry.



Installing, Finishing and Repairing Drywall Contents

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CERTIFICATE OF SERVICE

I, Nichele Rice, do hereby certify that on this 6th day of October, 1997, a true and correct copy of the foregoing "Reply Comments" was served via first-class U.S. mail, postage pre-paid to the following:

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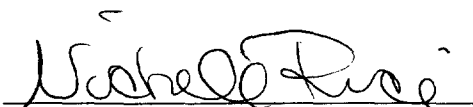
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